IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-659

W. RODNEY DEVILLIERS, *Petitioner,*

v.

ATLAS CORPORATION, *Respondent.*

PETITION FOR REHEARING

on

Petition for Writ of Certiorari to the United States Supreme Court

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W. RODNEY DEVILLIERS, Defendant in the above styled cause, presents his Petition for Rehearing, upon the Court's denial of his Petition for a Writ of Certiorari, in the above entitled cause, and in support thereof, respectfully shows:

I

The Court, in its denial of Defendant's Petition for a Writ of Certiorari, failed to consider substantial grounds not previously presented to this Court.

II

On November 23, 1964, Atlas Corporation obtained Judgment against Petitioner. Four years later, Atlas

Corporation caused execution to be made upon common stock allegedly owned by Petitioner.

On January 27, 1970, a hearing was held upon a Motion to Show Cause why Petitioner should not be held in civil contempt. Defendant filed a Motion to Dismiss the Plaintiff's Motion for Contempt Citation. Petitioner's Motion was dismissed without a hearing, as discussed below in Paragraph III.

A hearing was held before the United States District Court for the District of New Mexico on May 21, 1979, the Court entered its Order holding Petitioner in contempt. The contempt order was issued, in aid of judgment.

III

Defendant alleged in the above-stated Motion that Atlas Corporation did not use due diligence in levying upon Defendant's assets. Defendant alleged that had Atlas Corporation used due diligence in levying upon Defendant's property, Atlas Corporation could have satisfied its judgment.

Instead, Plaintiff, through gross negligence, allowed these assets to greatly deteriorate in value. The defendant wishes to place this argument in its proper perspective. Defendant W. Rodney DeVilliers was, at that time, the President and Chairman of the Board of DeVilliers Nuclear Corporation. Defendant's company and the Plaintiff were competitors in the uranium industry in New Mexico. Plaintiff's gross negligence in failing to levy upon the Defendant's assets within a reasonable time frustrated Defendant's effort to improve his economic status. It is more than coincidental that the economic status of the Defendant's company was also harmed.

This case exemplifies the helplessness restricting a losing litigant. Defendant W. Rodney DeVilliers could not force the Plaintiff to levy upon the property. The Defendant has no means of relieving his distress suffered through Plaintiff's abuse of the judicial process. As may be seen, this distress is particularly severe when thrust upon a losing litigant after judgment. What answer may be given to a winning litigant when he asserts that he is merely enforcing a judgment issued pursuant to a judicial order which is valid on its face?

The court's power of equity is the answer. A motion seeking to invoke the court's equitable powers is a proper means of relief in these circumstances. When the judgment creditor's conduct makes further enforcement of the judgment unfair, the court, through its equity power, may grant relief to the judgment debtor. See: *Restatement of the Law—Judgments,* Chapter 5, Sections 113 (b) and 125; and *Sammon v. Keebler,* 3 F.Supp. 584. Indeed, an unjustified delay between execution and sale may be evidence of fraud. *Green v. Sahlin,* 67 N.J. Super 592, 171 A.2d 133.

Plaintiff Atlas Corporation executed upon stock owned by Defendant. However, the Plaintiff then, through gross negligence, did not sell the stock until it greatly deteriorated in value. Such action by any plaintiff would raise the issue of fairness in satisfying the judgment; but this action was not undertaken by just any plaintiff. The Plaintiff in this cause is a corporation which is in direct competition with the Defendant's company in the uranium ore industry in New Mexico. Surely, the Court's equity powers are capable of granting relief in such a situation. This case presents a classic example of the possible abuse of

the judicial process. See: *Duress through Civil Litigation II,* Dawson 45 Mich.L.Rev.679. The author states at page 681, as follows:

> "... The power to appropriate and sell assets of the judgment debtor, like the other powers conferred by process in civil actions, is inherently capable of abuse. Even when the process is validly issued and fully authorized, the control of the creditor over *time,* place and conditions of sale will give him an important advantage and may enable him to liquidate the assets involved at a sacrifice price." (Emphasis ours)

See also *Williston on Contracts,* Revised Edition, 1937, Section 107. An unjustifiable delay between execution and sale is grounds for relief. Compare *Cook* v. *Wood,* 16 N.J.L. 254; *In re C. Lewis LeVine,* 36 F.Supp.351.

As mentioned above, Petitioner's motion raising this question was denied without hearing by the District Court. Petitioner respectfully shows to the Court that said action by the District Court denied him due process as guaranteed by the Constitution of the United States.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for Rehearing upon the Court's denial of Defendant's Petition for a Writ of Certiorari be granted, and that the judgment of this Honorable Court upon further consideration, be reversed.

STANDLEY, WITT AND QUINN
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Certificate of Counsel

I, BOSTON E. WITT, attorney for the Defendant, W. RODNEY DEVILLIERS, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for purposes of delay, and that the petition is restricted to substantial grounds available to Petitioner, although not previously presented.

/s/ BOSTON E. WITT